

CHEN KHAT,	)	
	)	
Petitioner,	)	CASE NO. C07-230-JCC-JPD
	)	
v.	)	
	)	
WARDEN JOHN GAY,	)	REPORT & RECOMMENDATION
	)	
Respondent.	)	
	)	

Petitioner is currently in the custody of the Washington Department of Corrections pursuant to his King County Superior Court conviction for rape of a child in the first degree. He has filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 seeking relief from his conviction. Respondent has filed an answer to the petition together with relevant portions of the state court record. Petitioner has filed a response to respondent's answer. The briefing is now complete and this matter is ripe for review. Following careful consideration of the record, this Court concludes that petitioner's § 2254 petition, and this action, should be dismissed with prejudice.

REPORT AND RECOMMENDATION  
PAGE - 1

## FACTUAL AND PROCEDURAL HISTORY

The Washington Court of Appeals summarized the facts relevant to petitioner's claims as follows:

Chen Khat was convicted at a jury trial of rape of a child in the first degree. After the trial and before sentencing, Khat filed a motion for a new trial claiming that his trial counsel, John Hicks, prevented him from testifying. The superior court held an evidentiary hearing where Khat and Hicks offered competing testimony.

Khat testified that he was unaware of his right to testify and that when he had told Hicks that he wanted to testify, Hicks told him he did not need him to testify and that Khat should not say anything and let him do his job. Hicks testified that Khat never demanded to testify and that he had explained Khat's rights to him. Hicks also testified he told Khat that if he testified he would risk having other sex abuse allegations introduced in rebuttal. Hicks explained, "I just saw a nest of vipers that could come up and bite us and Mr. Khat agreed." There was no other evidence offered other than these competing versions of events.

The superior court ultimately agreed with Hicks and found that Khat failed to show by a preponderance of the evidence that Hicks was ineffective. Khat appeals.

(Dkt. No. 10, Ex. 2 at 1-2.)

Petitioner, through counsel, filed a direct appeal of his conviction. (*See id.*, Ex. 3.) The opening brief of appellant identified the following assignments of error:

1. Mr. Khat was deprived of his federal and state constitutional right to testify in his own defense.
2. Mr. Khat received ineffective assistance of counsel.
3. The trial court erred in denying Mr. Khat's motion for a new trial.
4. The trial court erred in failing to determine whether Mr. Khat was prevented from testifying and whether he was prejudiced thereby.

(*Id.*, Ex. 3 at 1.)

The Court of Appeals upheld the trial court's finding that petitioner failed to prove by a preponderance of the evidence that his attorney prevented him from testifying. (*Id.*, Ex. 2 at 1.)

1 Petitioner next sought review by the Washington Supreme Court. (*See id.*, Ex. 5.) Petitioner  
 2 presented the following issues to the Supreme Court in his petition for review:

3 1. A criminal defendant has the constitutional right to the effective  
 4 assistance of counsel. Where defense counsel prevented the accused from testifying,  
 5 was he deprived of his Sixth Amendment right to counsel such that this Court should  
 review the case pursuant to RAP 13.4(b)(1), (3), and (4)?

6 2. Where a criminal defendant alleges his counsel prevented him from  
 7 testifying, this Court has held the trial court has an obligation to conduct an evidentiary  
 8 hearing and to resolve the issue of whether the waiver of the right to testify was  
 9 knowing and voluntary. Where the trial court failed to resolve the pertinent issue and  
 10 instead mischaracterized the issue, and where the Court of Appeals approved of the  
 trial court's handling of the issue, is review by this Court warranted pursuant to RAP  
 13.4(b)(1), (3), and (4)?

11 (Dkt. No. 10, Ex. 5 at 1.)

12 Petitioner's petition for review was denied without comment on July 12, 2005, and the Court  
 13 of Appeals issued its mandate terminating direct review on August 30, 2005. (*Id.*, Exs. 6 and 7.)

14 On January 6, 2006, petitioner filed a personal restraint petition in the Washington Supreme  
 15 Court. (*Id.*, Ex. 8.) Petitioner identified the following issues for review:

16 1. Was Mr Khat charged correctly with Rape of A Child (domestic  
 17 violence) instead of the crime of Incest.? [sic]

18 2. Did petitioner receive ineffective assistance of counsel when Trial  
 19 counsel's usurpation of Mr Khat's Constitutional right to testify was denied? Trial  
 20 counsel stated on the record that "HE" (trial counsel) usurped [sic] the decision  
 21 whether Mr. Khat should testify and the court's Written Conclusions refer to the  
 decision whether to testify as belonging to trial counsel, Is New Trial required.? [sic]

22 3. When Mr Khat presented substantial factual evidence that his trial  
 23 counsel prevented him from testifying, He is entitled to an evidentiary hearing at which  
 24 the court determines by preponderance of the evidence whether the Waiver of the right  
 to testify was knowing and voluntary. If it was not and prejudice is found, A New Trial  
 is required.

25 The Court's Written Findings of Facts and Conclusions of Law on Mr Khat's  
 26 Motion for New Trial neither directly addresses nor resolves whether the waiver of Mr

1 Khat's right to testify was knowing and voluntary. Is remand for an evidentiary hearing  
2 for determination of the issue required?

3 4. Did the Trial Court Abuse its discretion by Failing to undertake the  
4 proper inquiry, if whether Mr Khat was prevented from testifying and whether he was  
thereby prejudiced?. [sic]

5 (Dkt. No. 10, Ex. 8 at 2-3.)

6 On January 23, 2006, the Supreme Court Commissioner transferred the personal restraint  
7 petition to the Court of Appeals for consideration and, on April 4, 2006, the Court of Appeals  
8 dismissed the petition. (*Id.*, Exs. 10 and 12.)

9  
10 Petitioner thereafter filed a motion for discretionary review with the Washington Supreme  
11 Court. (*Id.*, Ex. 13.) Petitioner identified the following issues for review:

- 12 1. Petitioner was denied effective assistance of counsel, in violation of U.S.C.A.  
13 Amend. 6 and 14.
- 14 2. Petitioner was denied his constitutional right to testify on his own behalf, in  
15 violation of U.S.C.A. Amend. 6 and 14.
- 16 3. Petitioner was incorrectly charged with rape of a child and domestic violence  
instead of the crime of incest.

17 (*Id.*, Ex. 13 at 1.)

18 The Washington Supreme Court Commissioner issued a ruling denying review on July 13,  
19 2006. (*Id.*, Ex. 15.) Petitioner filed a motion to modify the Commissioner's ruling, but that motion  
20 was denied as well. (*Id.*, Exs. 16 and 17.) The Washington Court of Appeals issued its certificate of  
21 finality in petitioner's personal restraint proceedings on October 27, 2006. (*Id.*, Ex. 18.) Petitioner  
22 now seeks federal habeas review of his conviction.

#### 24 GROUND FOR RELIEF

25 Petitioner identifies three grounds for relief in his federal habeas petition:

GROUND ONE: Petitioner received ineffective assistance of counsel.

Petitioner received ineffective assistance of counsel, when his trial counsel John Hicks refused to allow petitioner to testify on his own behalf.

GROUND TWO: Petitioner was denied constitutional right to testify.

Trial counsel John Hicks refused to allow petitioner his sixth and fourteenth right to testify.

GROUND THREE: Petitioner was incorrectly charged.

Petitioner was incorrectly charged with rape of a child and Domestic Violence instead of the crime of Incest, when the state court admitted in open court that the victim was his daughter.

(See Dkt. No. 1, Petition at 5, 6, and 8.)

### DISCUSSION

Respondent concedes in his answer to petitioner's federal habeas petition that petitioner has properly exhausted his first and second grounds for relief. Respondent argues, however, that the decisions by the Washington state courts with respect to those claims were not contrary to, nor did they constitute an unreasonable application of, clearly established federal law and, thus, petitioner is not entitled to relief with respect to those claims. As to petitioner's remaining claim, respondent asserts that petitioner failed to properly exhaust his third ground for relief because he failed to present that claim to the state courts as a federal constitutional violation. Respondent argues that petitioner's unexhausted claim is procedurally barred and therefore not cognizable in this federal habeas proceeding.

### Exhaustion

The United States Supreme Court has made clear that state remedies must first be exhausted on all issues raised in a federal habeas corpus petition. *Rose v. Lundy*, 455 U.S. 509 (1982); 28

1 U.S.C. §2254(b), (c). Exhaustion must be shown either by providing the highest state court with the  
2 opportunity to rule on the merits of the claim or by showing that no state remedy remains available.

3 *Johnson v. Zenon*, 88 F.3d 828, 829 (9th Cir. 1996)(citations omitted).

4         The exhaustion requirement is a matter of comity, intended to afford the state courts "the first  
5 opportunity to remedy a constitutional violation." *Sweet v. Cupp*, 640 F.2d 233, 236 (9th Cir. 1981).  
6 A federal habeas petitioner must provide the state courts with a fair opportunity to apply controlling  
7 legal principles to the facts bearing on his constitutional claim. *Picard v. Connor*, 404 U.S. 270  
8 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982). It is not enough that all the facts necessary to  
9 support the federal claim were before the state courts or that a somewhat similar state law claim was  
10 made. *Harless*, 459 U.S. at 6. The habeas petitioner must have fairly presented to the state courts the  
11 substance of his federal habeas corpus claims. *Id.*

12         "If a petitioner fails to alert the state court to the fact that he is raising a federal constitutional  
13 claim, his federal claim is unexhausted regardless of its similarity to the issues raised in state court."  
14 *Johnson v. Zenon*, 88 F.3d at 830. In addition, "[i]t is not enough to make a general appeal to a  
15 constitutional guarantee as broad as due process to present the substance of such a claim to a state  
16 court." *Gray v. Netherland*, 518 U.S. 152, 163 (1996).

17         Petitioner asserts in his third ground for relief that he was incorrectly charged with the crime of  
18 rape of a child instead of the crime of incest. The record reflects that petitioner presented this claim to  
19 the state courts in his personal restraint proceedings. However, petitioner did not cite to any specific  
20 federal constitutional amendment nor did he cite to any federal cases in presenting the claim. Instead,  
21 petitioner relied exclusively on state law cases to support his assertion that he was improperly charged.  
22 As noted above, in order to properly exhaust a federal habeas claim, a petitioner must make clear in  
23  
24  
25  
26

1 the state courts that he is asserting a violation of a federal constitutional right. *See Johnson v. Zenon*,  
2 88 F.3d at 830. Because petitioner failed to specifically assert in either his personal restraint petition  
3 or his petition for review that his claim that he was incorrectly charged implicated federal  
4 constitutional concern that claim has not been properly exhausted.  
5

#### 6 Procedural Bar

7 When a petitioner fails to exhaust his state court remedies and the court to which petitioner  
8 would be required to present his claims in order to satisfy the exhaustion requirement would now find  
9 the claims to be procedurally barred, there is a procedural default for purposes of federal habeas  
10 review. *Coleman v. Thompson*, 501 U.S. 722, 735 n. 1 (1991).

11 Respondent argues that petitioner, having failed to properly exhaust his federal habeas claims,  
12 would now be barred from presenting those claims to the state courts under RCW 10.73.090 (time  
13 bar), and RCW 10.73.140 (successive petition bar). RCW 10.73.090(1) provides that a petition for  
14 collateral attack on a judgment and sentence in a criminal case must be filed within one year after the  
15 judgment becomes final. A judgment becomes final for purposes of state collateral review on the date  
16 that the appellate court issues its mandate disposing of a timely direct appeal. RCW 10.73.090(3)(b).  
17 The Court of Appeals issued its mandate terminating petitioner's direct appeal on August 30, 2005.  
18 (See Dkt. No. 10, Ex. 7.) Petitioner would therefore be time barred from presenting his unexhausted  
19 claim to the state courts.  
20  
21

22 In addition, because petitioner has previously presented a personal restraint petition to the state  
23 courts, the state courts are unlikely to entertain another such petition from petitioner. *See* RCW  
24 10.73.140. Accordingly, this Court concludes that petitioner has procedurally defaulted on his third  
25 ground for federal habeas relief.  
26

Cause and Prejudice

When a state prisoner defaults on his federal claims in state court, pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. *Coleman v. Thompson*, 501 U.S. at 750.

To satisfy the "cause" prong of the cause and prejudice standard, petitioner must show that some objective factor external to the defense prevented him from complying with the state's procedural rule. *Coleman*, 501 U.S. at 753 (citing *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). To show "prejudice," the petitioner must show not merely that the alleged errors created a possibility of prejudice, but that they worked to his actual and substantial disadvantage. *United States v. Frady*, 456 U.S. 152, 170 (1982). Only in an "extraordinary case" may the habeas court grant the writ without a showing of cause or prejudice to correct a "fundamental miscarriage of justice" where a constitutional violation has resulted in the conviction of a defendant who is actually innocent. *Murray v. Carrier*, 477 U.S. at 495-96.

Petitioner fails to establish that any factor external to the defense prevented him from complying with the state's procedural rules. Because petitioner has not met his burden of demonstrating cause for his procedural default, this Court need not determine whether petitioner carried his burden of showing actual prejudice. *Cavanaugh v. Kincheloe*, 877 F.2d 1443, 1448 (9th Cir. 1989) (citing *Smith v. Murray*, 477 U.S. 527, 533 (1986)). In addition, petitioner makes no colorable showing of actual innocence. Petitioner therefore fails to demonstrate that his third ground

1 for relief is eligible for review in these federal habeas proceedings. Petitioner's federal habeas petition  
2 should therefore be dismissed with respect to this claim.

### 3 Standard of Review for Exhausted Claims

4 Under the Anti-Terrorism and Effective Death Penalty Act, a habeas corpus petition may be  
5 granted with respect to any claim adjudicated on the merits in state court only if the state court's  
6 decision was *contrary to*, or involved an *unreasonable application* of, clearly established federal law,  
7 as determined by the Supreme Court, or if the decision was based on an unreasonable determination of  
8 the facts in light of the evidence presented. 28 U.S.C. § 2254(d) (emphasis added).  
9

10 Under the "contrary to" clause, a federal habeas court may grant the writ only if the state court  
11 arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the  
12 state court decides a case differently than the Supreme Court has on a set of materially  
13 indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362 (2000). Under the "unreasonable  
14 application" clause, a federal habeas court may grant the writ only if the state court identifies the  
15 correct governing legal principle from the Supreme Court's decisions but unreasonably applies that  
16 principle to the facts of the prisoner's case. *Id.* The Supreme Court has made clear that a state  
17 court's decision may be overturned only if the application is "objectively unreasonable." *Lockyer v.*  
18 *Andrade*, 538 U.S. 63, 69 (2003).  
19

20 In addition, if a habeas petitioner challenges the determination of a factual issue by a state  
21 court, such determination shall be presumed correct, and the applicant has the burden of rebutting the  
22 presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).  
23

### 24 Right to Effective Assistance of Counsel/Right to Testify

25 Petitioner asserts in his first ground for federal habeas relief that his trial counsel rendered  
26

1 ineffective assistance when he denied petitioner the opportunity to testify at trial. Petitioner asserts in  
2 his second ground for relief that he was denied his constitutional right to testify at trial.

3 The United States Supreme Court has recognized that a criminal defendant has a constitutional  
4 right to testify on his own behalf. *Rock v. Arkansas*, 483 U.S. 44 (1987). The Supreme Court has  
5 also recognized “that the accused has the ultimate authority to make certain fundamental decisions  
6 regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take  
7 an appeal.” *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (citations omitted).

9 A defendant’s relinquishment of his right to testify must be knowing and intentional. *United*  
10 *States v. Pino-Noriega*, 189 F.3d 1089, 1094 (9<sup>th</sup> Cir. 1999) (citing *United States v. Joelson*, 7 F.3d  
11 174, 177 (9<sup>th</sup> Cir. 1993)). However, a defendant’s waiver of his right to testify need not be explicit.  
12 *Id.* Rather, “waiver of the right to testify may be inferred from the defendant’s conduct and is  
13 presumed from the defendant’s failure to testify or notify the court of his desire to do so.” *Pino-*  
14 *Noriega*, 189 F.3d at 1095 (citing *Joelson*, 7 F.3d at 177).

16 Moreover, a defendant is “presumed to assent to his attorney’s tactical decision not to have  
17 him testify.” *Id.* “When a defendant remains ‘silent in the face of his attorney’s decision not to call  
18 him as a witness,’ he waives the right to testify.” *Pino-Noriega*, 189 F.3d at 1095 (citing *United*  
19 *States v. Nohara*, 3 F.3d 1239, 1244 (9<sup>th</sup> Cir. 1993)).

20 A criminal defendant also has a right, guaranteed by the Sixth Amendment, to the effective  
21 assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Claims of ineffective  
22 assistance of counsel are evaluated under the two-prong test set forth in *Strickland*. Under *Strickland*,  
23 a defendant must prove (1) that counsel’s performance was deficient and, (2) that the deficient  
24 performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

1 With respect to the first prong of the *Strickland* test, a petitioner must show that counsel's  
2 performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Judicial  
3 scrutiny of counsel's performance must be highly deferential. *Id.* at 689. There is a strong  
4 presumption that counsel's performance fell within the wide range of reasonably effective assistance.  
5 *Id.* In order to prevail on an ineffective assistance of counsel claim, a petitioner must overcome the  
6 presumption that counsel's challenged actions might be considered sound trial strategy. *Id.* "A fair  
7 assessment of attorney performance requires that every effort be made to eliminate the distorting  
8 effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate  
9 the conduct from counsel's perspective at the time." *Id.*

11 The second prong of the *Strickland* test requires a showing of actual prejudice related to  
12 counsel's performance. This requires a showing "that counsel's errors were so serious as to deprive  
13 the defendant of a fair trial, a trial whose result is unreliable." *Id.* at 687. In order to establish  
14 prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's  
15 unprofessional errors, the result of the proceeding would have been different. A reasonable probability  
16 is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

18 The reviewing Court need not address both components of the inquiry if an insufficient  
19 showing is made on one component. *Strickland*, 466 U.S. at 697. Furthermore, if both components  
20 are to be considered, there is no prescribed order in which to address them. *Id.*

21  
22 Petitioner's claims that he was denied the right to testify, and that he was denied effective  
23 assistance of counsel when his counsel prevented him from testifying, were first presented to the state  
24 courts in a motion for new trial. (*See* Dkt. No. 10, Ex. 2 at 1-2.) The King County Superior Court  
25 held an evidentiary hearing on petitioner's motion for new trial at which petitioner was afforded the  
26

1 opportunity to establish that his attorney had prevented him from testifying. (*See* Dkt. No. 10, Ex. 19,  
2 Transcript of September 29, 2003.) Both petitioner and his trial counsel, John Hicks, testified at the  
3 evidentiary hearing. (*Id.*) The superior court, after taking testimony and hearing argument, concluded  
4 that petitioner had not demonstrated by a preponderance of the evidence that he was entitled to a new  
5 trial. (*Id.* at 47-49.) The superior court therefore denied petitioner's motion. (*Id.*)

6  
7 The Washington Court of Appeals, on direct appeal, explained that petitioner's allegation that  
8 his attorney prevented him from testifying must be evaluated as a claim of ineffective assistance of  
9 counsel under *Strickland*. (Dkt. No. 10, Ex. 2 at 3.) The court of appeals further explained that "[i]f  
10 a defendant is able to prove by a preponderance of the evidence that his attorney actually prevented  
11 him from testifying, the defendant has satisfied the first prong of the *Strickland* test." (*Id.*) The court  
12 of appeals then reviewed the factual findings of the superior court as they pertained to petitioner's  
13 claim of ineffective assistance of counsel. (*Id.*)

14  
15 The court of appeals noted that the superior court, after hearing the competing testimony of  
16 petitioner and Hicks at the evidentiary hearing, had concluded "that Khat was informed of his right to  
17 testify on the record, that Hicks reviewed that right with him, and Hicks represented to the court at  
18 trial that Khat had waived that right." (*Id.* at 4.) The court of appeals concluded that these factual  
19 findings of the superior court were supported by Hicks' testimony and that, based on these findings,  
20 the superior court properly concluded that petitioner had not proven by a preponderance of the  
21 evidence that his attorney prevented him from testifying. (*Id.*) In other words, in the view of the  
22 court of appeals, petitioner failed to satisfy the first prong of the *Strickland* test.  
23  
24  
25  
26

1 The court of appeals' conclusion that petitioner failed to establish deficient performance on the  
2 part of trial counsel relative to petitioner's exercise of his right to testify is reasonable in light of the  
3 record as a whole. However, this Court has some concerns about the facts relied upon by the court of  
4 appeals to reach its conclusion.

5 Specifically, it appears to this Court that two of the three superior court factual findings relied  
6 upon by the court of appeals to support its conclusion that petitioner had not established deficient  
7 performance are not supported by the record. At issue are the findings that petitioner was informed of  
8 his right to testify on the record, and that petitioner's counsel represented to the court at trial that  
9 petitioner had waived that right. The court of appeals determined that these findings were supported  
10 by counsel's testimony at the evidentiary hearing. In fact, neither of these findings is supported by the  
11 record of petitioner's trial or by the testimony of petitioner's counsel at the evidentiary hearing.  
12

13 Nothing in the record before this Court reflects that petitioner was ever informed of his right to  
14 testify on the record. It appears that this factual conclusion found its way into the superior court's  
15 written findings and conclusions as a result of a statement made by the superior court judge during his  
16 oral ruling on petitioner's motion for new trial. Specifically, the trial judge stated as follows: "My  
17 recollection – and, again, I do not have the transcript – my recollection is specifically on the record  
18 that there was an opportunity for Mr. Hicks to confer with his client after which – and I believe it was  
19 at a recess – after which Mr. Hicks indicated that his client would not be testifying." (Dkt. No. 10,  
20 Ex. 19, Transcript of September 29, 2003, at 49.) The trial judge's recollection was inaccurate.  
21

22 The record reflects that counsel advised the court just prior to a recess that his client would  
23 not testify. (*See id.*, Transcript of March 31, 2003, at 30-31) Preceding the exchange regarding  
24 whether petitioner would testify was the testimony of the state's final witness, followed immediately  
25  
26

1 by argument on defendant's motion to dismiss. (Dkt. No. 10, Ex. 19, Transcript of March 31, 2003,  
2 at 3-30.) If there was an opportunity for petitioner and counsel to confer at this juncture regarding any  
3 decision at to whether petitioner would testify, it is not evident in the record.

4       As to the exchange itself between the court and counsel regarding whether petitioner would  
5 testify, the Court inquired of counsel "Mr. Hicks have you made a decision yet?" (*Id.* at 30.)  
6 Counsel's reply was "Mr. Khat will not testify." (*Id.*) While counsel may have intended to represent  
7 to the court through this exchange that petitioner intended to waive his right to testify, there is no  
8 reference anywhere in the trial transcript to petitioner's right to testify nor is there any indication in the  
9 transcript that personally waived that right.

11       Because the record does not reflect that petitioner was informed of his right to testify on the  
12 record or that counsel specifically represented to the court that petitioner had waived his right to  
13 testify, the court of appeals erred when it relied upon these facts to support its ultimate conclusion that  
14 counsel did not render ineffective assistance.

16       The third factual conclusion relied upon by the court of appeals, that counsel had reviewed  
17 with petitioner his right to testify, was supported by the record. Counsel's testimony at the evidentiary  
18 hearing made clear that counsel had not only advised petitioner of his right to testify, but that he had  
19 also explained to petitioner why it would not be in his best interest to testify. (*Id.*, Transcript of  
20 September 29, 2003, at 36-38.) Counsel's testimony at the evidentiary hearing also strongly  
21 suggested that petitioner understood his right to testify and that he agreed with counsel's conclusion  
22 that it would not be in petitioner's best interests to testify on his own behalf. (*Id.*) While petitioner  
23 offered contrary testimony at the hearing, it is evident from a review of the record of that  
24  
25  
26

1 proceeding that the superior court found counsel's testimony to be more credible. In this Court's  
2 view, the record amply supports the conclusion that counsel reviewed with petitioner his right to  
3 counsel and that counsel did not, in fact, prevent petitioner from testifying. Thus, the record also  
4 supports the conclusion that petitioner was not denied his right to testify nor his right to effective  
5 assistance of counsel.

6  
7 Assuming that petitioner's allegations concerning the denial of his right to testify can be given  
8 any credence, petitioner makes no showing that any such errors undermined the reliability of his  
9 criminal trial. Counsel, in his testimony before the superior court, offered a compelling explanation as  
10 to why he thought it inadvisable for petitioner to testify. Counsel expressed his concern about what  
11 might come out on cross-examination given some of petitioner's previous statements to counsel.  
12 (Dkt. No. 10, Ex. 19, Transcript of September 29, 2003, at 37.) Counsel also expressed his concern  
13 that if petitioner had testified it would have opened the door to testimony from other victims. (*Id.*)  
14 Finally, counsel indicated in his testimony that, given the nature of the case against petitioner, he didn't  
15 feel there was much to be gained by having petitioner testify. (*Id.* at 40.)

16  
17 Nothing in the record before this Court suggests that petitioner's testimony would have altered  
18 the outcome of the proceedings. Absent such a showing, petitioner is not entitled to relief in these  
19 federal habeas proceedings. *See Strickland*, 466 U.S. at 687. *See also, Brecht v. Abrahamson*, 507  
20 U.S. 619, 638 (1993) ( The standard for determining whether relief must be granted on federal habeas  
21 review is whether any claimed error "had a substantial and injurious effect or influence in determining  
22 the jury's verdict.") Accordingly, petitioner's federal habeas claims should be denied.

#### 23 CONCLUSION

24  
25 For the reasons set forth above, this Court recommends that petitioner's federal habeas petition  
26

1 be denied and that this action be dismissed with prejudice. A proposed order accompanies this Report  
2 and Recommendation

3 DATED this 13th day of August, 2007

4  
5   
6 JAMES P. DONOHUE  
7 United States Magistrate Judge  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26